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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Tariff Filing Requirements for) CC Docket No. 92-13
Interstate Common Carriers)

To: The Commission:

COMMENTS OF MOBILE MARINE RADIO, INC.

Mobile Marine Radio, Inc. ("MMR") respectfully submits these Comments in response to the Commission's Notice of Proposed Rule Making ("NPRM") in the above captioned proceeding.^{1/}

I. INTRODUCTORY STATEMENT

MMR, the licensee of public coast station WLO at Mobile, Alabama has, under its present management, rendered public coast station telecommunications services to the maritime community since 1947. MMR renders VHF-FM radio telephony service along the Gulf Coast and Alabama River System, as well as radiotelephony, radiofacsimile and radiotelegraphy service to ships at sea in the MF and HF bands.

MMR believes that the essence of common carriage is the nondiscriminatory holding out of service to all possible users. Such service only is available if common carriers file tariffs setting forth their rates and charges as well as the rules and

^{1/} 7 FCC Rcd 804 (1992).

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regulations governing the use of their services. MMR believes that its position is consistent with the provisions of the Communications Act which mandate tariff filing for all common carriers as a means of ensuring that common carriers maintain just and reasonable rates and refrain from discriminatory practices.

II. COMMENTS

A. The Statutory Scheme Mandates That All Common Carriers File Tariffs With The FCC.

MMR supports AT&T's position that all common carriers, both dominant and non-dominant, are required to file tariffs. Section 203 of the Communications Act ("the Act") requires "every common carrier . . . [to] file with the Commission . . . schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . . and showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). Common carriers are required under the Act to provide service based on "just and reasonable" charges and practices. Id. at § 201(b). A common carrier is forbidden to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons or locality." Id. at § 202(a).

These provisions of the Act establish a specific statutory scheme, setting forth requirements to ensure that common carriers do not discriminate in providing service and that they charge just and reasonable rates. See American Telephone and Telegraph Co. v. F.C.C., 487 F.2d 865, 872-73 (2d Cir. 1973). This statutory scheme represents a "careful accommodation of the various interests involved." Id. at 873 (citing United States v. SCRAP, 412 U.S. 669, 1697 (1973)). Thus, none of the Act's provisions can be read without consideration of the other provisions.

The Commission's Competitive Carrier Rulemaking proceeding divided common carriers into dominant carriers (those with the power to control price) and non-dominant carriers (those without the power to control price). See Competitive Carrier, First Report and Order, 85 F.C.C.2d 1, 20 (1980). In this proceeding, regulations for non-dominant common carriers were streamlined by reducing the notice period on tariff filings from 45 to 14 days and by eliminating the cost justification requirement. Id. at 34-35. The Commission later adopted the forbearance policy, establishing a permissive tariff filing requirement for non-dominant common carriers. Competitive Carrier, Second Report and Order, 91 F.C.C.2d 59, 65 (1982).

The FCC's forbearance policy, by exempting non-dominant carriers from the statutory tariff filing requirements, alters the statutory scheme envisioned by Congress. Without tariffs on file, it is impossible for the Commission to monitor these

carriers and ensure their compliance with the Act's provisions. Thus, by allowing permissive tariff filing for non-dominant common carriers, the FCC abrogates one of its duties under the Act -- to ensure that rates are not unjustly discriminatory. See 47 U.S.C. § 151 (imposing on the FCC the duty to "execute and enforce the provisions" of the Act).

Section 203 of the Act grants the Commission the authority to "modify any requirement made by or under authority of this section either in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b)(2). This authority, by definition, is limited. The Commission's power to modify only applies to the means of effecting tariff filing as prescribed by Section 203 of the Act (tariff filing); it does not allow the FCC to eliminate tariff filing or to alter its duties under the other provisions of the Act. By eliminating the mandatory tariff filing requirement for non-dominant common carriers, the Commission has made it impossible for it to ensure that all common carriers charge just and reasonable rates. This interpretation is consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit finding that the Commission did not have authority under Section 203 to abrogate the tariff filing requirement altogether by prohibiting non-dominant common

carriers from filing tariffs.^{2/} See MCI Telecommunications, 765 F.2d at 1195.

B. Tariff Filing Ensures That a Common Carrier's Rates are Just, Reasonable and Non-discriminatory.

Congress established tariffs as the means by which the Commission should monitor common carrier rates and charges and ensure compliance with the Act's provisions. Prior to the adoption of the forbearance policy, the FCC recognized the importance of filing tariffs, stating that:

[T]ariffs are essential to the entire administrative scheme of the Act. They serve as a kind of "tripwire" enabling the Commission to monitor the activities of carriers subject to its jurisdiction and to thereby insure that the charges, practices, classifications, and regulations of those carriers are just, reasonable, and nondiscriminatory within the meaning of Sections 201 and 202 of the Act. The importance of tariffs and the requirement that common carriers -- all common carriers -- must offer all of their communications services to the public through published tariffs is well established.

Western Union Telegraph, 75 F.C.C.2d 461 (1980) (emphasis in original); see MCI Telecommunications, 765 F.2d at 1192-93. The importance of filing tariffs recently was reasserted by the Supreme Court in Maislin Industries U.S. v. Primary Steel, Inc., 110 S.Ct 2759, 2766 (1990) (decided under the Interstate Commerce Act). The Maislin Court found that the "duty to file rates with the Commission and the obligation to charge only those rates have always been considered essential to preventing price

^{2/} The Court specifically did not decide whether forbearance from the tariff filing requirement for non-dominant common carriers was lawful as an enforcement matter. MCI Telecommunications Corp. v. F.C.C., 765 F.2d 1186, 1196 (D.C. Cir. 1985).

discrimination and stabilizing rates." Id. at 2766 (citations omitted). The Maislin Court recognized that compliance with the tariff filing provisions is "utterly central" to administering the provisions of the Interstate Commerce Act because without these filing provisions "it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory." Id. at 2769.

The FCC has held that its permissive forbearance policy for non-dominant carriers does not violate the tariff filing requirements of the Act because such carriers do not have the "incentive and ability rationally to charge rates that would violate the Communications Act's substantive requirements that rates be just and reasonable and not unreasonably discriminatory." AT&T Communications v. MCI Telecommunications Corp., 7 FCC Rcd 807 (1992). Under the Commission's analysis, the competitive market operates as a check on a non-dominant common carrier's practices and ensures that the rates charged by that carrier are reasonable. The Commission, however, stated in Competitive Carrier that in the event "forbearance has adverse consequences, the Commission can take such remedial action as may be necessary to protect the public, including the reimposition of the tariff filing requirement." 91 F.C.C.2d at 70.

MMR, based on its direct experience, submits that the Commission's forbearance policy has had adverse consequences on the international telex market. As reflected in the context of a

recent protest against an MMR tariff revision,^{3/} certain non-dominant common carriers in the international telex market are offering non-tariffed volume discounts applicable not only to their point-to-point telex service but also to their maritime service. By tying point-to-point telex service to the maritime service, these carriers are establishing market power over carriers such as MMR, which only offer maritime service. Without tariffing, the Commission has no direct means of knowing of such unlawful conduct.^{4/} Reimposing the tariff filing requirement on all common carriers clearly would establish that such non-tariffed discounts and other similar inducements are unlawful and, thereby, would prohibit non-dominant common carriers from discriminating in their rates.

**C. Congress Has Not Expressed a Clear
Intent to Ratify the Forbearance Policy.**

The Commission's reliance in the NPRM on Congress' enactment of the Telephone Operator Services Consumer Improvement Act of 1990 ("TOSCIA") as ratifying the forbearance rule is misplaced. See NPRM 7 FCC Rcd at 805. Under TOSCIA, operator service

^{3/} See Reply of Mobile Marine Radio, Inc. to Petition to Reject or Suspend, In the Matter of Mobile Marine Radio, Inc. Revision to Tariff F.C.C. No. 2., Transmittal No. 26 (October 10, 1991). See also Comments of MMR, In the Matter of Determination of Non-Dominant Status of Common Carriers in the Maritime Services, No. DF-88.001-DS (December 23, 1991).

^{4/} Although the tying arrangement was brought to the attention of the Common Carrier Bureau in the tariff dispute, to MMR's knowledge the Commission has not initiated action to address these tying arrangements.

providers are required to file "informational tariffs," which are more lenient than the tariffs required under Section 203. The Commission has the discretion to discontinue this tariff filing requirement after four years, if such requirement no longer is necessary. 47 U.S.C. § 226(h)(A)-(B). Informational tariff filing is designed to "protect consumers from unfair and deceptive trade practices relating to their use of operator services to place interstate telephone calls; and [to] ensure that consumers have the opportunity to make informed choices in making such calls." Id. at § 226(h)(A)-(B) and (d)(A)-(B).

According to the doctrine of ratification, when Congress reenacts, without change, statutory terms that have been given a consistent judicial or administrative interpretation, Congress has expressed an intention to adopt that interpretation. See Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 465 U.S. 353, 381-82 n.66 (1982). In requiring informational tariff filings, Congress has not "reenacted" Section 203; rather, it has established a separate statutory scheme for operator service providers with different goals than those achieved by the common carrier tariff filings specified in Section 203. TOSCIA neither addresses common carrier tariff filings under Section 203, nor the Commission's tariff forbearance policy; therefore, the Commission cannot now assume that Congress has ratified the forbearance policy by establishing an informational tariff filing scheme for operator service providers.

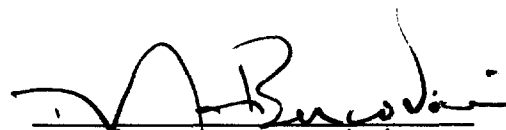
The Commission's permissive forbearance policy is unlawful as it is clearly inconsistent with the statutory scheme mandated by Congress; however, this does not mean that the entire

Competitive Carrier proceeding must be reexamined. Mandatory tariff filing is not inconsistent with streamlined regulation for non-dominant carriers. By allowing reduced notice periods and eliminating cost justification for non-dominant carriers, the Commission has recognized the differences between dominant and non-dominant carriers without circumventing the purposes behind the statutory scheme established for common carriers. The tariff filing requirement, however, is absolute under the Act because it is the method created by Congress for ensuring that all common carriers charge just and reasonable rates and comply with the non-discrimination provisions of the Act.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Mobile Marine Radio, Inc. respectfully submits that the Commission's permissive forbearance policy is unlawful under the Act and should be rescinded.

Respectfully submitted,



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